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**72-1178**

**In the Supreme Court of the United States**

OCTOBER TERM, 1972

North Dakota State Board of Pharmacy,  
Petitioner,

Snyder's Drug Stores, Inc.,  
Respondent.

**PETITION FOR WRIT OF HABEAS CORPUS**  
**To the Supreme Court of North Dakota**

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February 20, 1973

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### STATUTE

Section 43-15-35(5), North Dakota  
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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1973**

**No. \_\_\_\_\_**

**North Dakota State Board of Pharmacy,  
Petitioner,**

**vs.**

**Snyder's Drug Stores, Inc.,  
Respondent.**

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**PETITION FOR WRIT OF CERTIORARI**

**TO THE SUPREME COURT OF NORTH DAKOTA**

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To the Honorable, the Chief Justice and  
Associate Justices of the Supreme Court  
of the United States.

North Dakota State Board of Pharmacy,  
the petitioner herein, prays that a writ  
of certiorari issue to review the judg-  
ment of the Supreme Court of North Dakota  
entered in the above-entitled case on  
October 31, 1972.



**OPINIONS BELOW**

The opinion of the Supreme Court of North Dakota is reported at 202 N.W.2d 140 and is printed in Appendix A hereto, infra, page 17 . The judgment on remittitur of the District Court of North Dakota is printed in Appendix A hereto, infra, page 36 .

The order denying the petition for rehearing is printed in Appendix A hereto, infra, page 34 .

**JURISDICTION**

The decision of the Supreme Court of North Dakota (Appendix A, infra, page 32 ) was entered on October 31, 1972. A timely petition for rehearing was denied on November 29, 1972 with notice thereof given to petitioner on December 4, 1972. (Appendix A, infra, page 38 ).

The jurisdiction of the Court is invoked under Title 28, United States Code Annotated, Section 1257.

#### QUESTIONS PRESENTED:

Does Section 43-15-35(5), North Dakota Century Code, violate the due process clause of Section 1 of the Fourteenth Amendment of the United States Constitution?

#### STATUTE INVOLVED

Section 43-15-35(5) North Dakota Century Code:

"Requirements for permit to operate pharmacy.--The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

" 5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good

standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy; and

"The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such hospital."

#### STATEMENT

This was an appeal to the Supreme Court of North Dakota from a State District Court decision reversing an administrative agency decision of the North Dakota State Board of Pharmacy which denied a pharmacy permit to Snyder's Drug Stores, Inc. because it did not comply with the stock ownership require-



ments of Section 43-15-35(5) of the North Dakota Century Code.

The application for a pharmacy permit indicated that all of the common stock of Snyder's Drug Stores, Inc., was owned by Red Owl Stores and that it was not known if any shareholders of Red Owl Stores are or were pharmacists registered and in good standing in the State of North Dakota.

Section 43-15-35(5) of the North Dakota Century Code requires that the majority of the corporate stock of a corporate applicant for a pharmacy permit be owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

The Supreme Court of North Dakota

held that it was bound by the decision of the United States Supreme Court in Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928), and seeing insufficient basis for distinguishing that decision from the instant case, it sustained the trial court's conclusion that Section 43-15-35(5) of the North Dakota Century Code violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

#### REASONS FOR GRANTING THIS WRIT

The 1928 Liggett v. Baldridge United Supreme Court case, which the North Dakota Supreme Court felt bound by, has been discounted, seriously limited, perhaps completely undermined, and not followed by courts in California, Maryland, Michi-

gan and by the United States Supreme Court itself.

The California case of Magan Medical Clinic v. California State Board of Medical Examiners, 57 Cal. Rptr. 256, at Page 263, stated that there can be no doubt that the rule (in Liggett v. Baldrige) is now different, quoting with approval from the Maryland case of Brooks v. State Board of Funeral Dir. & Embalm, 195 A.2d 728, 735 (1963) where it states "It (the Liggett case) has been seriously limited, if not completely undermined."

In the Maryland case of Brooks v. State Board of Funeral Dir. & Embalm, 195 A.2d 728 at Page 735 it states as follows:

"The Liggett case has never been expressly overruled, but it has been seriously limited, if not completely undermined. See Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632, in which

the Supreme Court sustained a state statute forbidding undertakers to serve as agents for life insurance companies. In commenting on Liggett, the United States Supreme Court said (336 U.S. at Page 224-225, 69 S.Ct. at Page 553, 93 L.Ed. 632): "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop. This rationale did not find expression in Liggett Co. v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204, on which respondents rely. According to the majority in Liggett, "a state cannot" under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." 278 U.S. at Page 113, 49 S.Ct. at Page 59, 73 L.Ed. 204. But a pronounced shift of emphasis since the Liggett case has deprived the words "unreasonable" and "arbitrary" of the content for which respondents contend. See Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Iron and Metal Co., 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212; where the cases are reviewed."

The Brooks case at Page 735 also stated that "the sweep of the Liggett

case was already limited by the action of the Supreme Court in Markmann Funeral Home, Inc. v. Ryan, 300 U.S. 639, 57 S.Ct., 510, 81 L.Ed. 855.

It should be noted that the Supreme Court of Michigan, after many hearings and after extensive argument before their Supreme Court on three different occasions, in the case of Superx Drugs Corp. v. Michigan Board of Pharmacy reported at 146 N.W.2d 1, 134 N.W.2d 678, 132 N.W.2d 328, and 125 N.W.2d 13, has not by a majority decision of its Court, held a 25% ownership requirement by a registered pharmacist to be an unconstitutional requirement and they did not feel bound by the Liggett v. Baldridge case.

It is submitted that the North Dakota Supreme Court in the instant case, erred



in relying on Liggett v. Baldrige and in feeling that it was bound by this case in view of the criticism and conflicting interpretations of Liggett v. Baldrige by the courts in California, Maryland, Michigan, and by the United States Supreme Court in cases cited above.

As originally construed, the due process clause of the Fourteenth Amendment was viewed as a guaranty of procedural protection rather than bringing to the test of the decision of the United States Supreme Court the merits of the legislation. Davidson v. New Orleans, 97 U.S. 97, 103, 104 (1878).

Later the Court departed from this emphasis on the procedural aspect and considered the law itself. This attitude of the Court found expression in many cases

holding state and federal statutes unconstitutional and this philosophy prevailed when the Liggett Co. v. Baldridge case was decided by the court in 1928.

Current evidence of the shift in emphasis and philosophy of the Supreme Court is found in a recent case decided in 1963. The court sustained the constitutionality of a state law prohibiting other than lawyers from engaging in the business of debt adjusting or debt-pooling. The language of the court indicates its attitude:

"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable; that is unwise or incompatible with some particular social or economic philosophy. . . . This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr.

Justice Brandeis, Lochner v. New York, 198 U.S. 45 (1905).

"The doctrine that prevailed in the Lochner, Coppage, Adkins, Burns, and like cases, that due process authorizes courts to hold laws unconstitutional, when they believe the legislature has acted unwisely, has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

"We conclude that the Kansas legislature was free to decide for itself that legislation was needed to deal with the business of debt-adjusting . . . and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they are unwise, improvident, or out of harmony with a particular school of thought."

Ferguson v. Skrupa, 372 U.S. 726 729, 730, 731, 732 (1963).

With the change in emphasis and philosophy the present United States Supreme Court we feel would uphold the type of

law declared unconstitutional in 1928 in the Liggett v. Baldrige case and that the effect and holding of that case should be reviewed and changed through the granting of this Petition for Writ of Certiorari.

We feel that Section 43-15-35(5) of the North Dakota Century Code is a valid exercise of the police power of the State of North Dakota and does bear a real and substantial relation to the public health, safety, morals, and general welfare.

It is submitted that the Supreme Court of North Dakota erred in holding that it was bound by the Liggett Co. v. Baldrige case and in holding that Section 43-15-35(5) of the North Dakota Century Code violates the due-process clause of Section 1 of the Fourteenth Amendment to

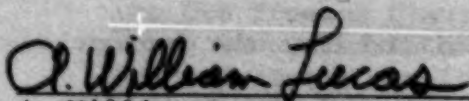
the United States Constitution.

### CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.



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February 20, 1973



PROOF OF SERVICE - CERTIFICATE OF SERVICE -  
SERVICE BY MAIL

I, Frederick E. Saefke, Jr., attorney for petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on February 23, 1973, I served a copy of the foregoing and attached Petition for Writ of Certiorari on Snyder's Drug Stores, Inc., respondent herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Mart R. Vogel, Wattam, Vogel, Vogel & Peterson, attorneys of record for respondent Snyder's Drug Stores, Inc. at Broadway and First Avenue North, Post Office Box 1389, Fargo, North Dakota 58102.

*Frederick E. Saefke*

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## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

Snyder's Drug Stores, Inc.,  
Respondent

v.

North Dakota State Board of  
Pharmacy,

Appellant

Civil No. 8834

1. The police power may be exerted in the form of state legislation where otherwise the effect may be to invade the rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.

2. A state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.

3. Being bound by the decision of the United States Supreme Court in *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928), and seeing in-

sufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35(5), N.D.C.C., violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

4. Because no evidentiary hearing was held by the Board of Pharmacy on the application for a permit, we remand the case to the trial court with instructions to it to remand the case to the Board of Pharmacy for an administrative hearing on the application, sans the constitutional issue, pursuant to our Administrative Agencies Practice Act.

(Syllabus by the Court)

Appeal from the District Court of Burleigh County, the Honorable M. C. Fredricks, Judge.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART.

Opinion of the Court by Erickstad, J.

Conmy, Conmy, Rosenberg, Lucas & Olson, Box 1398, Bismarck, for Appellant.

Wattam, Vogel, Vogel & Peterson, Box 1389, Fargo, for Respondent.

Snyder's Drug Stores, Inc.  
v.

North Dakota State Board of Pharmacy

Erickstad, Judge.

The North Dakota State Board of Pharmacy appeals from the summary judgment ordered by the district court of Burleigh County, which requires the Board to issue a permit to Snyder's Drug Stores, Inc., to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota. The judgment is dated January 6, 1972.

An application for a permit to operate a pharmacy was filed on the 25th of January 1971 by Lloyd D. Berkus, as president of Snyder's Drug. As indicated by various documents filed with the application, Snyder's Drug was to lease an area in the store building operated by Red Owl in Bismarck, North Dakota. A part of the store building was to be remodeled to meet the requirements of the Pharmacy Board.

On receipt of the application, the secretary of the Pharmacy Board investigated the proposed site and subsequently filed a report with the Pharmacy Board.

Without complying with Section 28-32-07, N.D.C.C., and without a hearing, the Pharmacy Board denied the application.



The denial is contained in the Pharmacy Board's findings of fact, conclusions of law, and order, dated March 22, 1971. Basically, the Board found that the existing facilities of the applicant did not meet the standards required by the Pharmacy Board and that the applicant failed to comply with Subsection 5 of Section 43-15-35, N.D.C.C. This subsection requires in the case of a corporate applicant that the majority of the stock be owned by registered pharmacists in good standing, who are actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

By notice of appeal dated April 12, 1971, Snyder's Drug appealed from the Board's order denying the application. In its specifications of error it asserted that Section 43-15-35(5), N.D.C.C. is unconstitutional, in that it violates the equal-protection and the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, and Sections 11 and 20 of the North Dakota Constitution. It also asserted that the Board's findings that it failed to comply with the regulations of the Board were not supported by the evidence and were not in accordance with the law.

On appeal to the district court, a motion for summary judgment was made by

Snyder's Drug. The trial court granted the motion upon the ground that Section 43-15-35(5), N.D.C.C., violates the previously described sections of the Constitutions of the United States and of North Dakota. It apparently further concluded that Snyder's Drug had satisfactorily complied with all reasonable regulations of the Board of Pharmacy entitling it to a permit to do business as a pharmacy.

Because the constitutional question is most crucial, we shall consider it first.

The case relied upon by the trial court in rendering its order and by Snyder's Drug in resistance to the appeal is *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928).

In Baldridge, the United States Supreme Court was considering the constitutionality of a Pennsylvania statute enacted in 1927. That statute required in the case of corporations, associations, and co-partnerships that all the partners or members thereof should be licensed pharmacists, with the exception that such corporations which were already organized and existing and duly authorized and empowered to do business in the state and owned and conducted pharmacies in the state, and which at the time of the passage of the Act still owned and conducted pharmacies in the state, could continue to do so.

Liggett Company, which at the time of the passage of the Act was empowered to own and conduct, and did own and conduct, pharmacies in the state, purchased two additional pharmacies, and it was in conjunction with the operation of these two additional pharmacies that the company was threatened with prosecution. The company sought to enjoin the attorney general and the district attorney from prosecuting it. The lower court, composed of three judges, held that the statute was constitutional upon the ground that there was a substantial relation to the public interest in the ownership of a drugstore where prescriptions were compounded.

The majority of the United States Supreme Court, speaking through Justice Sutherland, found the Act to be unconstitutional, in contravention of the due-process clause of the Fourteenth Amendment to the United States Constitution.

A pertinent part of the Sutherland opinion follows:

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general

welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of the public health?

"A state undoubtedly may regulate the prescription, compounding of prescriptions, purchase and sale of medicines, by appropriate legislation to the extent reasonably necessary to protect the public health. And this the Pennsylvania Legislature sought to do by various statutory provisions in force long before the enactment of the statute under review. Briefly stated, these provisions are: No one but a licensed physician may practice medicine or prescribe remedies for sickness; no one but a registered pharmacist lawfully may have charge of a drug store; every drug store must itself be registered, and this can only be done where the management is in charge of a registered pharmacist; stringent provision is made to prevent the possession or sale of any impure drug or any below the standard, strength, quality and purity as determined by the recognized pharmacopoeia of the United States; none but a registered pharmacist is permitted to compound physician's prescriptions; and finally, the supervision of the foregoing matters and the enforcement of the laws in respect thereof are in the hands of the State Board of Phar-

nacy, which is given broad powers for these purposes.

"It therefore will be seen that without violating laws, the validity of which is conceded, the owner of a drug store, whether a registered pharmacist or not, cannot purchase or dispense impure or inferior medicines; he cannot, unless he be a licensed physician, prescribe for the sick; he cannot unless he be a registered pharmacist, have charge of a drug store or compound a prescription. Thus, it would seem, every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded.

"The act under review does not deal with any of the things covered by the prior statutes above enumerated. It deals in terms only with ownership. It plainly forbids the exercise of an ordinary property right and, on its face, denies what the Constitution guarantees. A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57 at 59, 73 L.Ed. 204 (1928).



Justice Holmes, joined by Justice Brandeis, filed a short dissent. A part of the dissent follows:

"A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less. It has been recognized by the professions, by statutes and by

decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all the services in question are rendered by qualified members of the profession. (Citations omitted.)

"But for decisions to which I bow I should not think any conciliatory phrase necessary to justify what seems to me one of the incidents of legislative power. I think however that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the decree should be affirmed.

"Of course the appellant cannot complain of the exception in its favor that allows it to continue to own and conduct the drug stores that it now owns. The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and those of a later time." Liggett Co. v. Baldridge, supra, 49 S.Ct. 57 at 60.

The Board of Pharmacy contends that Baldridge may be distinguished from the instant case on the basis of the statutory provisions. They point out that the Pennsyl-

vania statute required that one hundred percent of the stock of the corporation be owned by pharmacists, whereas the North Dakota statute required only that a majority of the stock be owned by pharmacists. The Board further emphasizes that the North Dakota statute is concerned with control rather than mere ownership.

We do not believe that this difference is significant, particularly in light of the fact that under the Pennsylvania statute requiring pharmacists to own one hundred percent of the stock, control was of necessity in pharmacists much the same as under the North Dakota statute, which requires that the majority stock be owned by registered pharmacists in good standing, who are actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

The Board of Pharmacy contends that this case should be remanded for an evidentiary hearing before it relative to the constitutionality of the Act. It contends that although the constitutional issue was argued before the trial court, no evidence as such was submitted to the trial court on this issue, and accordingly, because this was an appeal from an administrative agency to the trial court, that if any evidence is to be submitted on this issue the case should be remanded to the administrative agency for that purpose.

Since no transcript has been certified to this court of the proceedings before the trial court, we do not know what took place before the trial court; but it does not appear from any of the arguments made in this court that a motion to remand the case to the administrative agency was made by any party for any purpose when the case was being considered by the trial court.

In respect to the facts relative to the constitutional issue, we find ourselves in the same position as the majority of the United States Supreme Court in Baldrige.

We quote:

"In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the Legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug

stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance." *Liggett Co. v. Baldrige, supra*, 49 S.Ct. 57, at 59, 60. (Emphasis added.)

Having no assurance from the Board of Pharmacy that specific evidence lacking in Baldrige and so far lacking in the instant case could be supplied on a remand, notwithstanding the Board's request that this case be remanded to the trial court with instructions to remand to the Phar-



macy Board for an evidentiary hearing on the constitutional issue, and because of the Board's failure to this date to produce such evidence, we hold that this request comes too late.

Being bound by the decision of the United States Supreme Court in Baldrige, and seeing insufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35(5), N.D.C.C., violates the due-process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

Since genuine issues of material facts otherwise exist in conjunction with the application on the part of Snyder's Drug for a permit, the motion for summary judgment as to those issues should have been denied by the trial court under Rule 56 of the North Dakota Rules of Civil Procedure.

Because no evidentiary hearing was held by the Board of Pharmacy on the application for a permit, we remand the case to the trial court with instructions to it to remand the case to the Board of Pharmacy for an administrative hearing on the application, sans the constitutional issue, pursuant to our Administrative Agencies Practice Act. See especially Sections 28-32-07, 28-32-18, and 28-32-19, N.D.C.C.

For the reasons stated, the judgment of the trial court is affirmed as it relates to the constitutional issue and reversed as it relates to the applicant's proof that it is otherwise qualified to receive a permit to operate a pharmacy under North Dakota law and the regulations of the North Dakota Board of Pharmacy.

RALPH J. ERICKSTAD  
WM. L. PAULSON  
OBERT C. TEIGEN  
HARVEY B. KNUDSON  
ALVIN C. STRUTZ, C.J.

File No. 8834

STATE OF NORTH DAKOTA )  
 ) ss.

In the Supreme Court, )  
Appeal from the District Court of Burleigh  
County.

Snyder's Drug Stores, Inc.,

### Respondent

v.

North Dakota State Board of  
Pharmacy,

Appellant

This action coming on to be heard at the September A.D. 1972 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: The Honorable Alvin C. Strutz, Chief Justice; the Honorable Obert C. Teigen, the Honorable Ralph J. Erickstad, the Honorable Harvey B. Knudson, the Honorable Wm. L. Paulson, Associate Justices; and the appeal herein having been argued by Mr. A. William Lucas for the Appellant and argued by Mr. C. Nicholas Vogel for Respondent and the court having been advised thereon it is now considered, ordered and adjudged that the judgment of the said District Court within and for said

Burleigh County appealed from herein, be and the same is hereby AFFIRMED IN PART, REVERSED IN PART IN ACCORDANCE WITH MY OPINION FILED HERewith.

AND IT IS FURTHER ORDERED, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

AND IT IS FURTHER CONSIDERED AND ADJUDGED, That Neither Party have and recover of the costs and disbursements on this appeal expended, to be taxed and allowed in the District Court.

Dated October 31, 1972.

By the Court,

s/ Alvin C. Strutz  
Chief Justice.

Attest:

s/Luella Dunn  
Clerk.

File No. 8834

STATE OF NORTH DAKOTA,)

) ss.

In the Supreme Court )

Appeal from the District Court of  
Burleigh County.

Snyder's Drug Stores, Inc.,

Respondent

v.

North Dakota State Board of Pharmacy,

Appellant

This action coming on to be heard at  
the September A.D. 1972 term of this Court  
at the Supreme Court room, in the City of  
Bismarck, State of North Dakota;

Present: The Honorable Alvin C.  
Strutz, Chief Justice; the Honorable  
Obert C. Teigen, the Honorable Ralph J.  
Erickstad, the Honorable Harvey B.  
Knudson, the Honorable Wm. L. Paulson,  
Associate Justices; and a petition for a  
rehearing upon the appeal herein having  
been filed by Mr. A. William Lucas for  
the Appellant and the court having advised  
thereon, it is now here considered,  
ordered and adjudged, that the petition  
be and the same is hereby DENIED.



AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this court.

Dated November 29, 1972.

BY THE COURT,

s/ Alvin C. Strutz  
Chief Justice.

Attest:

s/ Catherine Fox  
Deputy Clerk

STATE OF NORTH DAKOTA      IN DISTRICT COURT  
COUNTY OF BURLEIGH      FOURTH JUDICIAL  
DISTRICT

Snyder's Drug Stores, Inc.,  
Appellant.

vs.

North Dakota State Board  
of Pharmacy,  
Respondent.

#### JUDGMENT ON REMITTITUR

Upon the Order for Judgment on Remittitur made and filed in the above entitled action under date of December 29, 1972, it is

ORDERED, ADJUDGED AND DECREED that Section 43-15-35(5) of the North Dakota Century Code is unconstitutional and of no force and effect, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within sixty days from the date hereof the pharmacy board conduct an administrative hearing on the appellant's application for a pharmacy permit to determine whether, apart from the ownership requirement, the appellant is

qualified to receive a permit to operate a pharmacy under North Dakota law and the regulations of the North Dakota Board of Pharmacy, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall recover its costs and disbursements.

WITNESS the Honorable M. C. Fredricks, Judge of the District Court, Fourth Judicial District, Burleigh County, North Dakota, and my hand and seal of said Court this 4th day of January, 1973.

s/ Thora Dennis  
Clerk of the District Court

State of North Dakota  
Supreme Court  
Bismarck

Clerk of the Supreme Court  
Mrs. Luella Dunn

December 4, 1972

Conmy, Conmy, Rosenberg, Lucas & Olson  
Attorneys at Law  
Box 1398  
Bismarck, North Dakota 58501

Re: Our file #8834

Gentlemen:

The Court entered an order denying the petition for rehearing in the case of Snyder's Drug Stores, Inc. v. N. Dak. State Board of Pharmacy on November 29, 1972.

Accordingly, the remittitur is being forwarded to the Clerk of the District Court of Burleigh County today.

Sincerely yours,

s/ LUELLA DUNN  
Luella Dunn  
Clerk

LD:cf